# Public Prosecutor v Lin Lian Chen

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–104–90
ABDUL HAMID OMAR LP, GUNN CHIT TUAN AND EDGAR JOSEPH JR SCJJ
9 SEPTEMBER 1992

***Criminal Law*** *— Dangerous drugs — Trafficking — Presumption — Dangerous drugs found in a vehicle not concealed in any specially constructed compartment — Respondent driver not owner of vehicle — Circumstantial evidence of custody or control of drugs — Whether presumption can arise — Dangerous Drugs Act 1952 s 37(d) & (h)*

***Criminal Procedure*** *— Cautioned statement — Introduction at trial — Whether accused can introduce exculpatory cautioned statement during case for prosecution without recording officer being called*

***Evidence*** *— Statement — Introduction of exculpatory cautioned statement at trial — Whether accused can introduce statement during case for prosecution without recording officer being called*

A party of police officers led by one ASP Yusoff ambushed and arrested the respondent as soon as he had parked his car in the Stadium Negara Car Park, Kuala Lumpur. The car was immediately searched and recovered from the footwell of the car's rear nearside passenger seat was a plastic bag containing six newspaper packages, each of which contained a pink granular substance. A second search of the car subsequently resulted in the recovery of: another newspaper package containing a pink granular substance in the glove compartment; the registration card and car licence of the car, both in the name of Lim Hooi Yong; several business cards bearing the name of James Goh Liong Sin and a cigarette packet on the dashboard containing six cigarettes, each of which had traces of heroin. The evidence led by the prosecution disclosed that the car, although registered in the name of Lim Hooi Yong, actually belonged to James Goh Liong Sin. When the pink powdery substance from the packages recovered was analysed by the government chemist, it was found to contain in all 578.94g of heroin. At the trial counsel for the respondent in the course of the cross-examination of the investigation officer, attempted to introduce an exculpatory cautioned statement of the respondent recorded by one Insp Lai who, however, was not called by the prosecution. Despite objections by the prosecution, the learned judge allowed counsel for the respondent to introduce the cautioned statement, which was marked as a defence exhibit. At the end of the prosecution case the learned judge held that there was no case for the respondent to answer and acquitted him. The public prosecutor appealed.

**Held**, dismissing the appeal:

(1) A vehicle in which a drug is carried does not ipso facto fall within the words 'anything whatsoever containing any dangerous drug'

and therefore in such a case, the presumption contained in s 37(d) of the Dangerous Drugs Act 1952 ('the Act') did not arise.

(2) The drug was not found concealed in a specially constructed compartment of the motor car, so that it could in no way be deemed to have been so concealed with the knowledge of the owner of the car or the person in charge of it at the material time, that is, the respondent, by reason of the presumption in s 37(h) of the Act.

(3) Having regard to the particular circumstances of the case, the prosecution had to rely on circumstantial evidence to prove that the respondent had in his custody or under his control the seven packages and the six cigarettes containing heroin. The onus upon the prosecution is therefore a very heavy one and the evidence must point irresistibly to the guilt of the accused.

(4) Although the respondent was the sole occupant of the motor car, being the driver and therefore in charge of it, he was not its owner and there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet which contained the offending exhibits. The evidence against the respondent amounted only to grave suspicion and is insufficient to attract the presumption of custody or control under s 37(d) of the Act. On this ground alone the learned judge was entitled to rule, at the close of the prosecution case, that the respondent had no case to answer and to acquit and discharge him.

(5) The defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage. The trial judge was correct in admitting the cautioned statement of the respondent by way of cross-examination of the investigation officer, even though the recording officer had not been called by the prosecution, as the statement was that of the respondent who had personal knowledge of the facts stated therein and who had authenticated it by signing it.

**[Bahasa Malaysia summary**

Suatu pasukan polis yang diketuai oleh ASP Yusoff telah menyerang hendap dan menangkap penentang sebaik sahaja beliau telah meletakkan keretanya di Tempat Letak Kereta Stadium Negara, Kuala Lumpur. Kereta itu diperiksa dengan serta-merta dan telah dijumpai di lantai kereta di depan tempat duduk penumpang belakang di sebelah kiri kereta itu suatu beg plastik berisi enam bungkusan suratkhabar, tiap-tiap satunya mengandungi bahan yang berbutir berwarna merah jambu. Suatu pemeriksaan kereta itu kemudiannya menyebabkan penjumpaan: satu lagi bungkusan suratkhabar yang mengandungi bahan berbutir berwarna merah jambu di tempat menyimpan barang-barang kecil dalam kereta itu; kad pendaftaran dan lesen memandu

kereta itu, kedua-duanya dalam nama Lim Hooi Yong; beberapa kad perniagaan yang membawa nama James Goh Liong Sin dan suatu paket rokok atas papan pemuka berisi enam rokok, setiap satu mengandungi kesan-kesan heroin. Keterangan yang diberi oleh pihak pendakwa menunjukkan bahawa kereta itu, sungguhpun didaftar dalam nama Lim Hooi Yong, sebetulnya dimiliki oleh James Goh Liong Sin. Apabila bahan serbuk berwarna merah jambu daripada bungkusan-bungkusan itu dianalisis oleh ahli kimia kerajaan, ia didapati mengandungi 578.94g heroin. Di perbicaraan peguam bagi pihak penentang semasa pemeriksaan balas pegawai penyiasat, cuba mengemukakan suatu pernyataan beramaran penentang yang boleh membebaskannya daripada pertuduhan itu yang telah direkodkan oleh Insp Lai yang, akan tetapi, tidak dipanggil sebagai saksi oleh pihak pendakwa. Sungguhpun pihak pendakwa membantah, hakim yang arif telah membenarkan peguam bagi pihak penentang untuk mengemukakan pernyataan beramaran itu yang telah ditandakan sebagai ekshibit pembela. Di akhir kes pihak pendakwa itu hakim yang arif telah memutuskan bahawa tidak ada kes untuk dijawab oleh penentang dan telah membebaskannya. Pendakwa raya telah membuat rayuan.

**Diputuskan**, menolak rayuan itu:

(1) Sebuah kereta yang membawa dadah tidak ipso facto terangkum dalam perkataan-perkataan 'anything whatsoever containing any dangerous drug' dan oleh kerana itu di dalam kes seperti itu anggapan di bawah s 37(d) Akta Dadah Berbahaya 1952 tidak timbul.

(2) Dadah itu tidak terdapat tersembunyi di dalam suatu petak yang dibuat khas dalam kereta itu, dan oleh kerana itu ia tidak sama sekali boleh dianggap tersembunyi begitu dengan pengetahuan pemunya kereta itu atau orang yang bertanggungjawab atasnya pada masa yang penting, iaitu penentang, oleh kerana anggapan di bawah s 37(h) Akta itu.

(3) Memandangkan keadaan-keadaan tertentu di dalam kes ini, pihak pendakwa terpaksa bergantung kepada keterangan ikut keadaan untuk membuktikan bahawa ketujuh-tujuh bungkusan dan enam rokok itu yang mengandungi heroin ada dalam jagaan atau di bawah kawalan penentang, beban yang dipikul oleh pihak pendakwa oleh kerana itu adalah sangat berat dan keterangan itu hendaklah menunjukkan dengan tidak dapat dibendung bahawa si tertuduh itu bersalah.

(4) Walaupun penentang adalah penumpang tunggal kereta itu, beliau adalah pemandu kereta itu dan oleh kerana itu adalah bertanggungjawab atasnya, beliau bukanlah pemunya kereta itu dan tiada keterangan daripada mana kesimpulan yang munasabah boleh dibuat bahawa ketujuh-tujuh bungkusan suratkhabar atau paket rokok yang mengandungi ekshibit menyalahi undang-undang itu pasti ada dalam jagaan atau kawalan penentang. Keterangan terhadap penentang hanya menunjukkan syak kuat dan tidak men-

cukupi untuk menarik anggapan jagaan atau kawalan di bawah s 37(d) Akta itu. Atas alasan ini sendiri hakim yang arif berhak memerintahkan, apabila kes pihak pendakwa ditutup, bahawa penentang tidak mempunyai kes untuk menjawab dan untuk membebaskan dan melepaskannya.

(5) Pihak pembela berhak, melalui pemeriksaan balas saksi-saksi pendakwa, untuk mengemukakan kesnya pada peringkat yang paling awal. Hakim perbicaraan itu adalah betul dalam menerima pernyataan beramaran penentang melalui pemeriksaan balas pegawai penyiasat itu, walaupun pegawai yang merekodkan pernyataan itu tidak dipanggil sebagai saksi oleh pihak pendakwa oleh kerana pernyataan itu ialah pernyataan penentang sendiri yang mempunyai pengetahuan peribadi akan fakta-fakta yang dinyatakan di dalamnya dan yang telah mengesahkannya dengan menandatanganinya.]

**Cases referred to**

1 *PP v Mohamed Noor bin Jantan* [1979] 2 MLJ 289 (folld)
2 *Tong Peng Hong v PP* [1955] MLJ 232 (folld)
3 *Chang Kim Siong v PP* [1968] 1 MLJ 36 (folld)
4 *Tan Siak Heng v R* [1950] MLJ 214 (refd)
5 *Ibrahim v The King* [1914] AC 599 (folld)

**Legislation referred to**

Dangerous Drugs Act 1952 s 37(d), (h)

**Appeal from**: Criminal Trial No 58–37–87 (High Court, Kuala Lumpur)

*Dato' Stanley Isaacs* (Deputy Public Prosecutor) for the appellant.
*Manjeet Singh Dhillon* (*Manjeet Singh Dhillon*) for the respondent.

**Edgar Joseph Jr SCJ** (delivering the grounds of judgment of the court): The respondent was prosecuted in the High Court of the Federal Territory before Mokhtar Abdullah J upon the following charge:

> That you, on 28 March 1987 at about 2.40pm, at the Stadium Negara Car Park, Jalan Stadium, in the district of Kuala Lumpur, Wilayah Persekutuan, did traffick [sic] in a dangerous drug, to wit 578.94g of heroin, and you have thereby committed an offence under s 39B(1)(a) Dangerous Drugs Act 1952 (Rev 1980) and punishable under s 39B(2) of the said Act.

According to the evidence led by the prosecution, at about 2.15pm on 28 March 1987, acting on information received, a party of police officers headed by ASP Yusoff bin Mohamad, had laid an ambush at the Stadium Negara Car Park, Jalan Stadium, Kuala Lumpur. Some 25 minutes later, a Honda motor car driven by the respondent arrived at the car park, as soon as he had pulled up and switched off his engine, ASP Yusoff gave a prearranged signal to his party of men, whereupon they pounced upon the respondent while he was still seated in the driver's seat, placed him under

A arrest, and very soon after that, handcuffed him and took possession of the car keys.

An immediate search of the Honda by ASP Yusoff resulted in the recovery from the footwell of the rear nearside passenger seat, a plastic bag inside which was another plastic bag containing six newspaper packages each of which contained a pink granular substance.

B The Honda was then driven to the Anti-Narcotics Division Office by a member of the ambush team, where it was subjected to a second search, resulting in the recovery of the following articles:

(1) a newspaper package containing a pink granular substance from the glove compartment;

C (2) registration card and car licence of the Honda, both in the name of one Lim Hooi Yong, from the glove compartment;

(3) several business cards bearing the name James Goh Liong Sin from the glove compartment; and

(4) a cigarette packet containing six cigarettes on the dashboard.

D The evidence led by the prosecution also disclosed that

(a) the Honda, though registered in the name of Lim Hooi Yong, actually belonged to James Goh Liong Sin;

(b) the hotel register of the Emerald Hotel, indicated that one Koay Nian

E Taik was registered as the occupant of Room 414 from 7.50pm on 27 March 1987 until 1.50pm on 28 March 1987 and the Honda was registered against that room; and

(c) during interrogation by ASP Yusoff, the respondent had said that James Goh was at the Emerald Hotel.

F When the pink powdery substance found in the seven newspaper packages (six recovered from a plastic bag in the footwell of the rear nearside passenger seat and one from the glove compartment) was analysed by the government chemist, it was found to contain, in all, 578.94g of heroin, a dangerous drug within the meaning of the Dangerous Drugs Act 1952 ('the Act'). It was this substance which constituted the subject matter of the

G offence charged. The cigarette packet contained six cigarettes, each of which the chemist found to contain traces of heroin.

At the trial, counsel for the respondent had, in the course of his cross-examination of the investigation officer, Insp Hassan Jalaludin bin Abdul Malik, attempted to introduce an exculpatory cautioned statement of the

H respondent recorded by Insp Lai Joo Wah who, however, was not called by the prosecution. The attempt was resisted by the learned deputy public prosecutor who appeared for the prosecution, reliance being placed upon the Federal Court decision of *PP v Mohamed Noor bin Jantan*[1] where Suffian LP speaking for that court had to answer the question:

I > whether or not the defence is entitled in law to cause the prosecution to tender as evidence the cautioned statement recorded from an accused person during the course of the case for the prosecution when the prosecution does not intend to introduce it as part of the prosecution case.

His Lordship answered the question thuswise: A

> The prosecution is free to tender or not in evidence the cautioned statement; but if the recording officer gives evidence the defence is entitled to cause him to tender it in evidence even though the prosecution does not itself want to introduce it as part of its case. But if the recording officer is not called by the prosecution, he must be called by the defence during the course of the defence case for this purpose. B

The trial judge, however, overruled the objection of the prosecution and allowed counsel for the respondent to introduce the cautioned statement which was thereupon marked as a defence exhibit, namely, D22, being of the view that *Mohd Noor Jantan*'s case[1] was distinguishable on the facts. C

Of the respondent's cautioned statement made the day after his arrest, the trial judge had this to say:

> The cautioned statement, made one day after the accused's arrest, was exculpatory in nature and made references to Ah Schen (as the owner of the Honda Accord DP 5212) and Ah Tik, both staying at Room 414, Hotel Emerald. The accused described how he was asked by one Mr Soh, a friend of Ah Schen, to drive the car to the car park at Stadium Negara to await an old man and how the plastic bag containing the offending drug was placed in the car by the old man. The facts disclosed in the cautioned statement bore striking similarities to the facts enumerated earlier pertaining to the car DP 5212, James Goh Liong Sin and Koay Nian Taik of Room 414, Hotel Emerald, Kuala Lumpur. These facts disclosed in the course of the prosecution case tended to show that the accused's explanation in his cautioned statement as to the circumstances whereby he came to be driving the car could probably or reasonably be true. D E

In the event, at the close of the case for the prosecution, the trial judge acceded to a submission by counsel for the respondent that there was no case to answer on two separate grounds, namely: F

(1) lack or absence of evidence as to the expertise of the chemist in the field of analysis of dangerous drugs; and
(2) insufficient evidence of custody, control or possession of the drugs the subject matter of the charge. G

Having regard to the view we took of the second ground upon which the trial judge based his order of acquittal and discharge, it was unnecessary for us to consider his first ground.

Before us, as regards the second ground upon which the trial judge based his order of acquittal and discharge, it was argued by the learned deputy public prosecutor, in effect, that because the respondent was, at the material time, the sole occupant of the Honda, which although not owned by him, was in his custody or under his control, consequently, the seven newspaper packages which contained the drugs recovered from the Honda, although not recovered from a specially constructed compartment therein, were, ipso facto, or in other words, as a matter of law, also in his custody or control, and therefore there was a case for the respondent to answer, regard being had to the provision of s 37(d) of the Act which says: H I

> any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be

A deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

With respect, we considered that that submission went too far and was clearly wrong for reasons we shall state.

In the first place, we would respectfully agree with the proposition of law B enunciated by Thomson J (as he then was) in *Tong Peng Hong v PP*,[2] that a vehicle in which a drug is carried does not ipso facto fall within the words 'anything whatsoever containing any dangerous drug' and therefore in such a case, the presumption contained in s 37(d) does not arise.

Secondly, in the present case, the drug was not found concealed in a specially constructed compartment of the Honda, so that it could in no way C be deemed to have been so concealed with the knowledge of the owner of the Honda or the person in charge of it at the material time, that is to say, the respondent, by reason of the presumption contained in s 37(h).

Thirdly, having regard to the particular circumstances of the present case, the prosecution had to rely on circumstantial evidence to prove that D the respondent had in his custody or under his control the seven packages (six recovered from the plastic bag found in the footwell of the rear nearside passenger seat and one found in the console box, containing in all 578.94g of heroin) and the six cigarettes containing traces of heroin recovered from the cigarette packet found lying on the dashboard.

It is trite law that where the prosecution is relying on circumstantial E evidence the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient (per Pike CJ in *Chang Kim Siong v PP*[3]).

Turning to the evidence, although it is true that the respondent was the sole occupant of the Honda, being the driver and therefore in charge of it, F the fact remains, that he was not its owner and, there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet which contained the offending exhibits.

In this context, mere knowledge of the presence of the seven newspaper packages or the cigarette packet in the Honda without more would not be G sufficient to constitute custody or control thereof though it would constitute an essential step in that direction. But, the position here was that there was not even proof of such knowledge much less proof of knowledge of the presence of the offending exhibits *in* the seven newspaper packages or the cigarette packet. For example, there was nothing to indicate for how long in H all the respondent had been in charge of the Honda and such evidence as had been adduced indicated that he was seen only briefly at the wheel. No evidence was adduced as to whether the seven packages or the cigarette box had been dusted for fingerprints or as to whether the respondent's hands or fingernail clippings were examined for traces of heroin nor was there anything even suspicious about the behaviour of the respondent before or I at the time of his arrest; for example, he made no difficulties when arrested.

We consider that it would not be an unfair summary of the case for the prosecution against the respondent, on the question whether it was proved that he was in custody or control of the seven packages or the cigarette packet, containing the offending exhibits, if we said that the evidence

against him in relation thereto was, essentially, of juxtaposition. It goes without saying that such evidence, which amounts to nothing more than grave suspicion, is totally inadequate for purposes of inferring control or even custody of the containers concerned sufficient to attract the presumption under s 37(d). Accordingly, on this ground alone, the learned judge was perfectly entitled to rule, at the close of the case for the prosecution, that the respondent had no case to answer and to acquit and discharge him.

A final point needs to be made. The trial judge appreciated correct law when he held, as he did in fact hold, that the defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock so that the prosecution is taken by surprise, the accused runs the risk of being criticized for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention. Accordingly, we respectfully agree with Suffian LP when he said in *Mohd Noor bin Jantan*'s case:[1]

> The prosecution is free to tender or not in evidence the cautioned statement; but if the recording officer gives evidence the defence is entitled to cause him to tender it in evidence even though the prosecution does not itself want to introduce it as part of its case.

But, in the very next sentence, Suffian LP went on to say:

> But if the recording officer is not called by the prosecution he must be called by the defence during the course of the defence case for this purpose.

It is this sentence, which gave rise to a difficulty both in the court below and before us, since it implies that a cautioned statement cannot be introduced in evidence through anyone other than the recording officer. We note that further down in his judgment, Suffian LP did add something which, with respect, appears to be somewhat inconsistent with what he had said in the passage reproduced above. What he added was something which we consider both sound and wholesome and it was this:

> ... In our judgment it is immaterial whether or not the statement is a public document — for the principle is that a witness who has any document which is within possession or power which is required by the defence and which is material to the defence, is bound to produce; and this rule applies whether or not the document is public or private — save that in the case of a document within the possession or power of government, Crown privilege may in certain circumstances be claimed. And it is not suggested that the cautioned statement here is protected by Crown privilege.

If, subject to the consideration of privilege, the defence is entitled — and we consider it plainly is — to elicit by cross-examination of prosecution witnesses, oral evidence, which goes either to destroy the case for the prosecution, or to support its own case, we fail to see why it may not elicit, in the same way, documentary evidence, for the same purpose, as we see no distinction in principle between the two situations. Where, of course, a document is elicited in this way, on general principle, its author would have

A to be called unless he is dead or untraceable or cannot for any other satisfactory reason be called, in which case someone having personal knowledge of the contents thereof (see, eg *Tan Siak Heng v R*[4]) or saw him write it or is acquainted with his handwriting, would have to be called to prove its contents.

B To recapitulate, in the present case, it will be recalled that the prosecution had called the investigation officer (who had in his possession or under his control the cautioned statement of the respondent), but *not* the recording officer. Counsel for the respondent had then sought to introduce the cautioned statement by way of cross-examination of the investigation officer. The trial judge acceded to that request, over the objection of the C learned deputy public prosecutor, the cautioned statement having been marked as a defence exhibit, being exh D22. In this, we consider, the trial judge was entirely correct for even though the recording officer had not been called by the prosecution, the statement was that of the respondent who had personal knowledge of the facts stated therein and who had authenticated it by signing it. In other words, it was the respondent who D was the author thereof and who had himself wished it to be admitted, it being acknowledged by him in the cautioned statement itself, that it was made voluntarily after due administration of the statutory caution.

We need hardly add that the position would have been very different had it been the prosecution who was seeking to have admitted the cautioned E statement over the objection of the defence. In such a situation it would have been incumbent upon the prosecution, during a trial-within-a-trial, to prove its admissibility, by calling, at the very least, the recording officer, and the interpreter (if there were one) to demonstrate beyond reasonable doubt that the statement was made voluntarily (see *Ibrahim v The King*[5]) and after due administration of the statutory caution. The accused would then be F entitled to give evidence and to call witnesses, to give his own version of the circumstances under which the cautioned statement came to be made.

Having said that, we recognize that viewed from another angle, it may not be incorrect to regard the recording officer of a cautioned statement by an accused, to be also the maker of the statement while the accused would G be the supplier of information contained therein for the statement will have been brought into existence in writing in the course of the performance by the writer of a duty to record information supplied to him by the accused who may reasonably be supposed to have personal knowledge of such information.

We need hardly add that from the point of view of the general law of H evidence, one of the most important exceptions to the hearsay rule in criminal cases, is the admissibility of statements by accused persons, whether cautioned or uncautioned. (See, eg s 113(1) of the Criminal Procedure Code (FMS Cap 6), s 37A(1) of the Dangerous Drugs Act 1952, s 75(1) of the Internal Security Act 1960, and s 15(1) of the Prevention of Corruption Act 1961.) The admissibility of documentary hearsay like business or I professional records under s 32(b) of the Evidence Act 1950, or duly verified copies of entries in books of account under s 3 of the Bankers' Books (Evidence) Act 1949, is also provided for. It would be beyond

the scope of this judgment to attempt a detailed enumeration of all statutory exceptions to the hearsay rule but a few are mentioned by way of illustration.

Accordingly, with considerable regret, for the reasons stated, we are unable to accede to the submission advanced by the learned deputy public prosecutor both in the court below and here, based upon *Mohd Noor bin Jantan*'s case,[1] that unless the recording officer is called by the prosecution, the cautioned statement of the accused can in no circumstances be introduced during the case for the prosecution at the behest of the accused.

In the result, the appeal was dismissed and the order of acquittal and discharge affirmed.

*Appeal dismissed.*

Reported by Prof Ahmad Ibrahim